U.S.
FILED
JAN 10 1981
MICHAEL RODAK, JR., CLERK

No. 80-930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BLUE SHIELD OF VIRGINIA

and

BLUE SHIELD OF SOUTHWESTERN VIRGINIA, *Petitioners,*

v.

VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS

and

ROBERT J. RESNICK, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

TIMOTHY J. BLOOMFIELD
Counsel of Record

ALAN KRIEGEL
DUNNELLS, DUVALL, BENNETT & PORTER
1220 Nineteenth Street, N.W.
Washington D.C. 20036
(202) 861-1440

WARWICK R. FURR, II
THOMAS M. BROWNELL
LEWIS, MITCHELL & MOORE
8320 Old Courthouse Road
Vienna, Virginia 22180
(703) 790-9200

Attorneys for Respondents, Virginia Academy of Clinical Psychologists and Robert J. Resnick

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTES INVOLVED iii

PRELIMINARY STATEMENT 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

A. The Fourth Circuit Finding That Petitioners' Anticompetitive Conduct Was Not Within The McCarran-Ferguson Act Represented A Routine Application Of Supreme Court Decisions On "The Business Of Insurance" And "Boycott." . 10

(1) Business of Insurance 10

(2) Boycott 14

B. The Fourth Circuit Did Not Find All Blue Shield Plans To Be "Inherent Conspiracies" And Its Decision, Compelled By The Particular Facts Of This Case, Does Not Threaten The Existence Of Any Blue Shield Plan 14

C. The Fourth Circuit Correctly Held That The Plans' Joint Action To Exclude Psychologists Is Not Protected Speech Under The Noerr-Pennington Doctrine 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASES — PAGE

Allied International, Inc. v. *International Longshoremen's Ass'n.*, 492 F.Supp. 334 (D. Mass. 1980) ..... 20 n. 25

Associated Press v. *United States*, 326 U.S. 1 (1945) 17

Ballard v. *Blue Shield of Southern West Virginia*, 453 F.2d 1075 (4th Cir. 1976) *cert. denied*, 430 U.S. 922 (1977) 14

Blue Cross of Virginia v. *Commonwealth*, 211 Va. 180, 176, S.E.2d 439 (1970) ..... 16 n. 22

Board of Supervisors v. *Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) ..... 7 n. 9, 20 n. 24

Cow Palace, Ltd. v. *Associated Milk Producers, Inc.*, 390 F.Supp 696 (D. Colo. 1975) 19

Cowardin v. *Burrage*, 195 Va. 54, 77 S.E.2d 428 (1953) ..... 7 n. 9, 20 n. 24

Criterion Ins. Co. v. *Grange Mutual*, 210 Va. 446, 171 S.E. 2d 669 (1976) ..... 7 n. 9, 20 n. 24

Crown Central Petroleum Corp. v. *Waldman*, 486 F.Supp. 759 (M.D. Pa. 1980), rev'd on other grounds, [1980] 5 Trade Reg. Rep. (CCH) ¶ 63,635 (3rd Cir. November 17, 1980) ..... 21 n. 25

Fashion Originators Guild v. *Federal Trade Commission*, 312 U.S. 427 (1941) 17

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) . 2, 8, 17

Group Life and Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) ..... *passim*

Human Resources Institute of Norfolk v. *Blue Cross of Va.*, 498 F.Supp. 63 (E.D. Va. 1980) ..... 18 n. 23

International Travel Arrangers, Inc. v. *Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) 22

Missouri v. *National Organization of Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3216 (October 6, 1980) .. 21 n. 25, 22

Table of Authorities Continued

CASES: PAGE

Nat. Gerimedical Hospital v. *Blue Cross of Kansas City*, 479 F.Supp. 1012 (W.D. Mo. 1979) *aff'd.*, 1980-2 Trade Cases ¶ 63, 447 (8th Cir. 1980) ..... 11 n. 13

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 2, 8, 13, 17, 18

Patterson v. *Patterson*, 44 Va. 113, 131 S.E. 217 (1921) ..... 20 n. 24

Radiant Burners, Inc. v. *Peoples Gas Light Coke Co.*, 364 U.S. 656 (1961) 17

Rice v. *Sioux City Memorial Park*, 349 U.S. 70 (1954) .. 1

St. Bernard Hospital v. *Hospital Service Association*, 618 F.2d 1140 (5th Cir. 1980) ..... 11 n. 13

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978) 8, 10, 14

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 17, 18

Teamsters Local 695 v. *Vogt*, 354 U.S. 284 (1957) 22

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967) 15, 16

United States v. *Southern Motor Carriers Rate Conference, Inc.* 467 F.Supp. 471 (N.D. Ga. 1979).... 22-23

STATUTES:

15 U.S.C. §1 ..... *passim*

U.S.C. §1012 ..... *passim*

15 U.S.C. §1013(b) ..... *passim*

Va. Code §8.01-184 ..... 7 n. 9, 20 n. 24

Va. Code §38.1-241 ..... 12 n. 14

Va. Code §38.1-810 ..... 16 n. 22

Va. Code §38.1-811 ..... 16 n. 22

Va. Code §38.1-818 ..... 12 n. 14

Va. Code §38.1-824 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-930

BLUE SHIELD OF VIRGINIA

and

BLUE SHIELD OF SOUTHWESTERN VIRGINIA, *Petitioners,*

v.

VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS

and

ROBERT J. RESNICK, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

It has been long established by this Court,* as reflected in Rule 19 of its Rules, that "[a] review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

As demonstrated in the argument below, no special reasons for review are presented in the instant Petition. The decision of the Fourth Circuit below, finding a combination of physicans to restrain competition from clinical psychologists by denying them important economic benefits, and rejecting proferred grounds of antitrust immunity for those anticompetitive practices,

* Rice v. Sioux City Memorial Park, 349 U.S. 70 (1954).

merely applies well-settled principles of antitrust law from *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), through *National Society of Professional Engineers*, 435 U.S. 679 (1978), in a straightforward and routine fashion. Moreover, once the actual facts of the defendants' so-called "claims policy" are clarified (see Supplemental Statement of the Case, *infra*) it is clear that the physicians' boycott of other health care professionals here involved no underwriting risks and no business of insurance. Hence, this case presents no conflict with the decisions of this Court, and in fact, is in accordance with the decisions of other federal appellate courts which have recently decided similar issues.

In short, because the decision presented for review here is in agreement with sound judicial precedent in this Court and lower federal courts and because it presents no unusual or extraordinary issues of law, this Court's standards for review are not met and the Petition must be denied.

SUPPLEMENTAL STATEMENT OF THE CASE

Almost all of petitioners'[1] arguments in support of certiorari are founded upon this one central factual assertion: That in 1972, the Blue Shield plans decided to expand "insurance" benefits under their prepaid health care contracts to include payments for treatment of mental health problems by clinical psychologists, but only where the treatments were supervised and billed through a physician.

With this "premise" as their springboard, petitioners then argue, in essence, that this so-called "new"

---

[1] Petitioners are Blue Shield of Virginia (the "Richmond Plan") and Blue Shield of Southwestern Virginia (the "Roanoke Plan").

claims policy "expanding" coverage constitutes the very essence of the business of insurance, thus casting the Fourth Circuit's decision in conflict with this Court's decision in *Royal Drug*. Moreover, according to petitioners, no conspiracy could exist since this expanded claims policy benefited psychologists to the detriment of physicians, and, in any event, petitioners must be immunized from antitrust liability lest physicians lose important rights of free speech guaranteed by the First Amendment.

Because this critical factual premise, so central to petitioners' arguments, is not supported by the record below, respondents are constrained to present this supplemental statement of the case.

Contrary to the repeated assertions of petitioners,[2] their refusal to pay psychologists did not represent an expansion of coverage. Since 1962 both Plans have included outpatient coverage for mental and nervous disorders and have approved and paid for psychotherapy as a treatment. Between 1962 and 1972, the Richmond Plan made direct payments to psychologists. In 1972, however, the Plan reversed its practice and refused to pay for psychologists' services unless those services were billed by physicians. This change represented a restriction imposed by the Plan on the *providers* whom it would pay for covered services. It meant that, in contrast to the previous practice, the Plan would make payments only to physicians and not to competing non-physician professionals licensed under

---

[2] Petition, p.4, 10, 11, 13 and 14.

state law to provide the same services. This is documented by a Blue Shield Richmond memorandum which states:

> The Major Medical Contract provided benefits for the covered services of independently-billing Ph.D. psychologists from the inception of the Major Medical Contract in 1962 until a Corporate Claims Policy reversal on February 22, 1972. This policy (Interim 21.7 issued February 22, 1972) required that for covered services performed by these providers, supervision and billing through by a physician (M.D.) must occur in order for coverage to be provided. [J.A. 321, Appendix A]

The foregoing facts are clear from the record and have not been controverted.[3] Nonetheless, in direct conflict with the record, petitioners repeatedly make statements like the following:

> The claims policy here, however, is directly contrary to the economic interests of the physicians who, according to the Fourth Circuit, conspired in adopting the policy. In the absence of the claims policy, the Plans' contracts would not have covered the services of psychologists *at all*. If, as the Fourth Circuit found, psychologists compete with psychiatrists, then the claims policy improved the psychologists' competitive position to the disadvantage of psychiatrists and other physicians. [Petition 13-14.][4]

---

[3] Appendix A; *see also*, 624 F.2d at 478; 469 F.Supp. at 556; Plaintiffs' Exhibit ("PX") 6-001; Trial transcript ("Tr.") 205; Joint Appendix in Fourth Circuit ("J.A.") 85; 321. The petition contains the first claim by the petitioners that the policy was anything other than a restriction on the choices available to subscribers as to eligible providers.

[4] Indeed even petitioners' "Questions Presented" misstate the facts. Question 2 asserts that the policy represented "an expansion

In fact, the record shows just the opposite. The exclusionary policy was designed, in the words of Levi W.Hulley, Jr., M.D., a physician who is the Richmond Plan's medical director, to stop "once and for all" the "encroachment" of non-physician providers [*i.e.*, competitors] who were "working their way into the therapy field."[5] Since the Richmond Plan and the Roanoke Plan are the dominant prepaid health care plans in Virginia, covering, within their respective service areas, over 40 percent of all potential patients, this policy had a devastating effect on competition. When they curtailed direct payment to psychologists, the Plans eliminated competition between physicians and psychologists for the largest single block of "insured" consumers in Virginia.

The nature of these particular Blue Shield Plans, and the manner in which the exclusionary policy came about, demonstrate that the Court below was not faced with "independent decisions" as to "insurance contracts." Instead, as the Fourth Circuit concluded, the policy represented a conclusion by "a group of professionals" that competition was not "beneficial in their line of work."[6]

For instance, the contracts administered by the Plans are between subscribers and "Participating physicians acting by and through" their agents, Blue Shield (PX7-001; J.A.332).[7] The Richmond Plan advertises

---

of coverage to include psychologists [which] was directly contrary to the physicians' economic interests." Again, this statement is wrong, and all of petitioners' arguments based on it have no support.

[5] 624 F.2d at 481 n.6.

[6] 624 F.2d at 485.

[7] In citations to the record below, plaintiffs' trial exhibits are designated "PX-," and "J.A."

itself as "the economic arm of the medical profession" and as the "doctors' plan for doctors." The Plan says it is "sponsored by the Medical Society of Virginia," (PX9-006;J.A. 131, 133, 184; 342A), which during the period at issue here controlled selection of the Board of Directors. Thus, the Richmond Plan, controlled by a physician majority, proclaimed that its payment policies and practices were formulated and managed by physicians in conjunction with their trade associations. (PX9-006, J.A. 342A)

The evidence showed that the policy itself reflected a desire to limit competition between psychologists and Blue Shield's participating physicians. The non-payment policy was recommended by the Neuropsychiatric Society of Virginia (NSV), and it was endorsed by the Medical Society of Virginia.[8] It was a way to stop "encroachment." This fact is no better expressed than by a Blue Shield official who, in a letter to a participating physician, stated:

> I hope that you agree with your fellow physicians on the Blue Shield Board that Blue Shield should not make payment to a large variety of non-physicians who are now providing a number of services formerly provided only by physicians. (PX 24-008; J.A. 479).

In May, 1973, the Virginia legislature passed Va. Code Ann. 38.1-824 (the "Freedom of Choice" statute), which required the Plans to make direct payment to psychologists. The Richmond Plan decided to disobey

---

[8] At the beginning of discussions about the policy, Dr. Levi Hulley, M.D., Blue Shield's medical director, sought to educate NSV about the "socio-economics" of medicine. (PX1-015; J.A. 302).

the statute and promptly communicated its decision to the Roanoke Plan. The Roanoke Plan reaffirmed its policy of paying only physicians. In August, 1975, at a meeting described by the Plans as a "Summit Meeting" between the Plans' officials, the noncompliance decision was confirmed. Subsequent Board minutes of the Roanoke Plan again confirmed that agreement:

> *Mr. Bushnell said the Plan was denying these claims due to an agreement with the other Blue Shield Plans operating in Virginia*, and at the directive of our Blue Shield Board until the Richmond lawsuit had been settled. (PX 3-038; J.A. 318) (emphasis added).

The Roanoke Plan, however, has never been a party to any litigation regarding the state statute, and the litigation in which the statute's constitutionality was finally adjudicated was an enforcement action brought only against Blue Shield Richmond by the State Corporation Commission in 1977. There has been no contention that the *Roanoke* Plan had to violate the law in order for the *Richmond* Plan to contest its validity.[9] The Fourth Circuit was fully supported by the record when it concluded that the Plans' refusal to comply "amounted to no more than an agreement to persist in economically restrictive commercial activity."[10]

---

[9] There is no support in the record for petitioners' statement (Petition, p. 6, n. 12) that the Richmond Plan had been advised by counsel that it could not maintain a declaratory judgment action. No such advice could reasonably have been given, since Virginia's declaratory judgment statute clearly would have allowed such an action. Va. Code 8.01-184; Bd. of Supvrs. v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975); Cowardin v. Burrage, 195 Va. 54, 77 S.E.2d 428 (1953); Criterion Ins. Co. v. Grange Mutual, 210 Va. 446, 171 S.E.2d 669 (1976).

[10] 624 F.2d at 482.

The Fourth Circuit decision and opinion was unanimous, and was based upon settled antitrust principles which have been reaffirmed by this Court in a number of recent opinions, such as *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), and *Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979).

Thereafter, the petitioners sought a rehearing and *en banc* consideration, describing the panel's decision as "bizarre" and in direct conflict with the decisions of this Court, particularly *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). The petition for rehearing was denied on September 9, 1980.

While the case was on remand, these same petitioners, pointing to recent state court developments adjudicating their acts in violation of state law, moved the District Court to vacate and dismiss this case as moot even though the petitioners had only ceased to violate state law and made no suggestion that their combination in violation of the Sherman Act had come to an end.[11]

The District Court on December 2, 1980 correctly concluded that the case was not moot and that it would go forward on some issues of equitable relief even though some of the provisions respondents sought for a final decree were rejected.

---

[11] The grounds for petitioners' mootness motion existed and were known to petitioners while this case was still within the jurisdiction of the Court of Appeals on petitioners' petition for rehearing. They waited, however, until the case was remanded to the District Court and then sought to "vacate" the Fourth Circuit's decision.

REASONS FOR DENYING THE WRIT

Rule 19 of the Rules of this Court provides that a writ of certiorari will not be granted in the exercise of the Court's discretion unless it is clear that the ". . . court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

These standards are not and cannot be met by the Petition here, for the Fourth Circuit's decision below rests on settled antitrust precedents in harmony with decisions of this Court and those of other federal courts of appeals. Petitioners' primary argument, that the Plans are entitled to the exemption of the McCarran-Ferguson Act, must fail because the Fourth Circuit's decision, far from being in conflict with this Court's recent decision in *Royal Drug*, was in fact compelled by that decision; it is likewise consistent with decisions in other circuits applying *Royal Drug*; and, in any event, McCarran-Ferguson Act protection is not available to petitioners because their conduct falls within the "boycott" exclusion to the Act.

The Fourth Circuit did not hold that the Plans were "inherent conspiracies," as asserted by petitioners. Instead, the holding is based on the particular facts of this case, which show active physician control and anti-competitive purpose. Additionally, the decision below rests upon findings of concerted action between the

Plans. Finally, the Fourth Circuit's *Noerr-Pennington* analysis was correct and, even if wrong, would not require reversal because of alternative grounds of concerted action.[12]

A. The Fourth Circuit Finding That Petitioners' Anticompetitive Conduct Was Not Within The McCarran-Ferguson Act Represented A Routine Application Of Supreme Court Decisions On "The Business Of Insurance" And "Boycott."

The Fourth Circuit's decision needs no review on its McCarran-Ferguson Act holdings. It rests squarely on *Royal Drug* and is also compelled by *St. Paul Fire & Marine Ins. Co.* v. *Barry, supra.* The Petition raises no important questions of law and there are no conflicting decisions in the circuits.

(1) *Business of Insurance.* The Petition makes two points here, but neither has merit.

First, the Petition argues that the refusal to pay psychologists constituted "the business of insurance" because it was an "underwriting decision" providing an "expansion" of coverage. This argument must fail because it is factually incorrect. Psychotherapy has been covered by both Plans since 1962, and until 1972 the

---

[12] One alternative ground is the concerted action by the participating physicians in each Plan to refuse to pay psychologists. The record also reflects concerted action which was not acknowledged by the Fourth Circuit but which nonetheless would stand in the way of a reversal. For instance, the Plans joined together on various master contracts which contain the restrictive provision. While the Fourth Circuit did not find liability on the basis of this action, the record clearly shows this as concerted action under the Sherman Act.

Richmond Plan paid psychologists. There was a change in 1972, but it was not an expansion of coverage; instead Blue Shield simply eliminated payments to clinical psychologists for providing otherwise covered services. As the Fourth Circuit stated:

> Their decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of who they would pay for such services. The coverage remained the same. [624 F.2d at 484.]

In *Royal Drug*, this Court held that an arrangement whereby one group of providers (participating pharmacies) were entitled to reimbursement on more favorable terms than another group of providers (non-participating pharmacies) was not "business of insurance" entitled to protection under the Act.[13]

Faithfully adhering to that ruling, the Fourth Circuit here held that a similar arrangement whereby one group of providers (physicians) were entitled to reimbursement on more favorable terms than another group of providers (psychologists) was also not protected under McCarran-Ferguson.[14] Here, as in *Royal Drug*, the prac-

---

[13] Lower courts have had no uncertainty about *Royal Drug* in this respect and there is no conflict or confusion in the circuits. *See* St. Bernard Hospital v. Hospital Service Association, 618 F.2d 1140 (5th Cir. 1980); National Gerimedical Hosp. v. Blue Cross of Kansas City, 479 F.Supp. 1012, 1014-1016 (W.D. Mo. 1979), *aff'd* 1980-2 Trade Cases ¶63,447 (8th Cir. 1980).

[14] 624 F.2d at 484. Although the Fourth Circuit did not reach the issue, under this Court's decision in *Royal Drug*, Virginia's Blue Shield Plans have no claim to McCarran-Ferguson Act protection at all since they do not engage in the risk-taking function of insurance companies and therefore are simply not engaged in the state-regulated "business of insurance." The Plans do not underwrite

tice at issue is related to and perhaps even was "indirectly referred to" in the Blue Shield-subscriber contract.[15] Yet in both cases the designation of eligible (or preferred) providers concerns the Plans' purchases of services from providers on behalf of the subscribers, not the underwriting of risk or the insurer-subscriber relationship.

The Petition's second point is that the discriminatory reimbursement practices are "indispensable for the reliable enforcement" of the subscriber contract since they assure that treatment rendered by psychologists to subscribers is "medically necessary." (Petition at 10-11). Like the Petition's first point, this assertion is factually unsound. The restraints at issue — the physician supervision and bill-through requirement — cannot be justified as a means to assure that treatment is "medically necessary." The Fourth Circuit was on solid ground when it stated:

> Any assertion that a physician must actually *supervise* the psychologist to assure the quality of psychotherapy treatment is refuted by the policy itself. The Blue Shield policy provides for payment

---

risks but instead contract to provide health care services to their subscribers *in kind* upon need. In fact, the Plans admit they are immune from risk altogether since their participating physicians have agreed in advance to provide all required services to subscribers in return for whatever money is available through the Plans. (Tr. 932; J.A. 203.) Also, the Plans are excluded from the application of key provisions of the state insurance code. In particular, while insurance company rate-making is regulated (the key reason for the McCarran-Ferguson Act exemption), Blue Shield premium-fixing is not. *Compare* Va. Code §38.1-241 (1976) with §38.1-818 (Supp. 1979) (Tr. 607, 620-21; 355; J.A. 113; 155-157.)

[15] *See Royal Drug, supra*, 440 U.S. at 216 n. 14.

> to psychologists for psychotherapy if billed through any physician — not just those who regularly treat mental and nervous disorders. It defies logic to assume that the average family practitioner can supervise a licensed psychologist in psychotherapy, and there is no basis in the record for such an assumption. [624 F.2d at 485]

Petitioners' argument that the bill through requirement is necessary for "reliable enforcement" is really just an echo of the "incantation of 'good medical practice' " which the Fourth Circuit properly rejected as a justification for the Plans' anticompetitive behavior under this Court's decision in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). 624 F.2d at 485. The Court's decision there — that groups of professionals may not impose curbs upon competition for reasons of public welfare — applies with even greater force here, where the policies of the Sherman Act are joined with a state legislative determination that the public welfare requires psychologists to be free to compete as independent economic entities with physicians.[16]

The Petition's second point is defeated also by another important teaching of *Royal Drug* — that the McCarran-Ferguson Act must be read narrowly, particularly when Blue Shield plans are involved. The Court made it clear that concepts of "reliability, interpretation and enforcement" cannot be used to expand the scope of the McCarran-Ferguson Act.[17]

---

[16] It would be particularly ironic if the conduct of the Blue Shield Plans here, which violates state law, were to be immunized from antitrust scrutiny by the McCarran-Ferguson Act, which was itself inspired by a policy of deference to state regulation.

[17] 440 U.S. at 217-232.

(2) *Boycott*. Even if the Court granted review here, and decided that the Fourth Circuit's analysis of *Royal Drug* was wrong, the decision below would still be left standing because, as a "boycott," the petitioners' conduct falls outside the area of McCarran-Ferguson Act protection. As the Fourth Circuit observed,[18] the Plans' reimbursement practices with respect to psychologists in this case closely resemble the practices with respect to chiropractors in *Ballard* v. *Blue Shield of Southern West Virginia*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), where a similar boycott determination was made by the same Court. In view of *St. Paul Fire & Marine Ins. Co.* v. *Barry, supra*, that conclusion is both correct and unremarkable.

B. The Fourth Circuit Did Not Find All Blue Shield Plans To Be "Inherent Conspiracies" And Its Decision, Compelled By The Particular Facts Of This Case, Does Not Threaten The Existence Of Any Blue Shield Plan.

The Petition is factually wrong when it asserts that the Fourth Circuit's finding of concerted action was predicated on the physician majority on the Richmond Plan's Board of Directors. (Petition 12) This is not just a "structural" decision; active anticompetitive conduct was proven. When more objectively examined, the Fourth Circuit decision will be seen as it is — an application of

---

[18] Petitioners erroneously assert that the Fourth Circuit did not reach the question whether these practices are a boycott. (Petition at 7 n.17.) While the Fourth Circuit did decline to apply a *per se* analysis because "of the special considerations involved in the delivery of health services," the practices at issue were nonetheless found to constitute a boycott, and to be an unreasonable restraint of trade. 624 F.2d at 484-85.

familiar antitrust principles to group action with unquestionably anticompetitive purpose and effect.

As set forth earlier,[19] the Richmond Plan acted as agent for its physicians; it called itself the "doctors' plan for doctors;" it said it was sponsored by the Medical Society of Virginia and was the "economic arm of the medical profession;" and its payment practices were openly formulated by physicians in conjunction with their trade associations. The practice at issue here eliminated competition between participating physicians and their non-physician competitors for the business of servicing the largest single block of Virginia consumers. This elimination of competition was no accident; in the words of Blue Shield's medical director it was designed "once and for all" to stop "encroachment" by non-physicians into the province of medical doctors. The restrictive policy was recommended, formulated and adopted by Blue Shield's physician board members,[20] and it directly benefited their own economic interests.

The Petition rests heavily on an effort to distinguish *United States* v. *Sealy, Inc.*,[21] but this effort must fail

---

[19] *See* pages 5-6, *supra*.

[20] The non-medical staff of the Richmond Plans had commenced plans to comply with the Freedom of Choice law, but those plans were terminated by a decision of the physician-dominated Blue Shield board. *E.g.*, PX 3-004; J.A. 311. That decision was not based on factors of public health or cost, because those factors were not considered at the time. What was considered was the idea that the legislature should not "mandate" or "dictate" that nonphysicians should be paid by the "doctors' plan for doctors." Tr. 576.

[21] 388 U.S. 350 (1967).

because it relies on two factual errors. First, as seen above, the Fourth Circuit did not find concerted action based simply on the composition of the Plans' boards of directors. Second, and just as important, the Fourth Circuit recognized, as did this Court in *Sealy*, the significance of the fact that the practice in question promoted the economic and competitive interests of the decisionmakers; *i.e.*, the licensees in *Sealy* and the physicians here. When the petitioners assert that the practice here — the refusal to pay psychologists — is contrary to the interests of participating physicians (Petition 13), they ignore and seek to obscure the fact that the practice was a restriction designed to stop non-physician "encroachment."

The Fourth Circuit correctly determined that the Plans were not acting here as unitary entities, and that they did not reach independent business judgment apart from the collective will of their participating physicians. This is not a remarkable conclusion; the Supreme Court of Virginia reached the same result when it examined the counterpart Blue Cross organization ten years ago.[22]

In complete disregard for the record, petitioners claim that each Plan is "indistinguishable from an ordinary, widely-held corporation" and cite the "black letter rule that a corporation cannot conspire with itself." (Petition 13) The Plans are not public stock corporations but rather are membership associations and this Court

---

[22] Blue Cross of Virginia v. Commonwealth, 211 Va. 180, 176 S.E.2d 439, 435 (1970). There, among several combinations found to violate the Sherman Act "was that of the participating hospitals which constitute Blue Cross, in the same fashion as participating physicians constitute Blue Shield." 624 F.2d at 480. *Compare* Va. Code §38.1-810 with §38.1-811.

has repeatedly rejected such defenses where professional associations have placed restraints on competition to the benefit of their members. The Fourth Circuit properly and explicitly relied on that authority in rejecting those arguments here. *See* 624 F.2d at 481, *citing, e.g., National Society of Professional Engineers* v. *United States, supra*, (association's policy of prohibiting competitive bidding among members struck down as conspiracy among members of the society to restrain trade); *Goldfarb* v. *Virginia State Bar, supra*, (minimum fee schedule for county and state bar associations struck down as price fixing between the associations and their members); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (association of member stock brokers held to have conspired in violation of the Sherman Act by withdrawing rights to instant electronic access to stock quotes from non-member brokers, thus depriving them of substantial business benefit); *Radiant Burners, Inc.* v. *Peoples Gas Light Coke Co.*, 364 U.S. 656 (1961) (trade association held to have violated Sherman Act by discriminatorily refusing to certify as safe a non-member's gas burner); *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 427 (1941). *See also, Associated Press* v. *United States*, 326 U.S. 1 (1945).

The teaching of these cases — which is not new, novel or cause for confusion or uncertainty — is that trade associations and professional organizations risk antitrust liability when they restrict competition among members or when they assist the economic interests of their constituents to the detriment of other, excluded, competitors. They become vulnerable to attack whenever they withhold "[a] valuable service germane to [industry members'] business and important to their economic

competition with others," for arbitrary, capricious or anticompetitive reasons. *Silver, supra*, 373 U.S. at 348 n.5. Blue Shields' participating physicians control a truly "valuable business service" which all health care professionals need "in order to compete effectively" in the marketplace. *Silver, supra*, 373 U.S. at 347. Forty percent of Virginia health care consumers are entitled to Blue Shield benefits and any competitor for these consumers whose services are not covered by Blue Shield is effectively excluded from this market.

The Fourth Circuit decision in no manner threatens a Plan's ability to make "routine decisions . . . regarding coverage," as petitioners allege.[23] (Petition 14). The Fourth Circuit's opinion expressly provides that the Plans are free to chart their own courses with respect to coverage and other matters germane to their operation, so long as their actions do not unreasonably restrict competition between physicians and other health care providers qualified to provide the services which the Plans have decided to include within the coverage of their subscriber contracts. The line between legal and illegal conduct has been clearly drawn, *e.g., National Society of Professional Engineers, supra*, and there is nothing unsettling or extraordinary about the Fourth Circuit opinion on this issue.

---

[23] Indeed, other district courts in the Fourth Circuit have since rejected such an *in terrorem* construction, concluding that it was the physician dominance and anti-competitive purposes which controlled. Human Resources Institute of Norfolk v. Blue Cross of Va., 498 F.Supp. 63, 66 (E.D. Va. 1980) ("*VACP* does not stand for the proposition that an agency relationship, or a 'collective nature,' can, without more, bring a prepaid health plan within the purview of the Sherman Act. Rather . . . it was the abundant evidence of physician control [which established a violation].")

C. The Fourth Circuit Correctly Held That The Plans' Joint Action to Exclude Psychologists Is Not Protected Speech Under the Noerr-Pennington Doctrine.

Recognizing that immunities for antitrust violations are to be narrowly construed, federal courts have been careful to limit the scope of *Noerr-Pennington* immunity to activities necessary to produce desired legislative or judicial action and not to collateral commercial practices which have anticompetitive consequences. "[O]ne does not escape Sherman Act proscriptions by camouflaging true antitrust violations with the plumage of 'political activity.'" *Cow Palace, Ltd.* v. *Associated Milk Producers, Inc.*, 390 F.Supp. 696, 702 (D. Colo. 1975). The *Noerr-Pennington* doctrine certainly protects the First Amendment right to petition, but it does not sanction anticompetitive conduct which is not necessary in the exercise of that right.

Petitioners overlook this crucial distinction in arguing that the *Noerr-Pennington* doctrine immunizes their activity. They appear to concede, as they must, that the Plans agreed with each other that both Plans would refuse to pay psychologists, in violation of the state statute. Their argument, however, is that the Plans somehow insulated this anticompetitive conduct from review under the antitrust laws *by also having* discussions about a challenge to the validity of the state statute. This argument must fail since the Roanoke Plan admittedly never challenged the statute, 624 F.2d at 482; there is thus no *Noerr-Pennington* justification for *Roanoke's* collaboration in *Richmond's* violation and that collaboration in no way affected any exercise of First Amendment rights.

Moreover, as the Fourth Circuit reasoned, any challenge to the validity of the "Freedom of Choice" statute could have been mounted by either or both Plans without any agreement between them to flout the law and engage in anticompetitive activity in the process.[24] Indeed, there is no way in which the joint *conduct* of the Plans in violating the statute can have been calculated to advance any petition by either or both for legal redress. Since it was not necessary to violate the law in order to test it, the Plans have no claim whatever to *Noerr-Pennington* protection.

In an effort to create a reviewable issue where none exists, petitioners cite a number of cases involving economic boycotts by groups which had purely political objectives, and no anticompetitive motives. These cases are instructive, if at all, for the stark contrast they pre-

---

[24] 624 F.2d at 482. Va. Code §8.01-184 permits state courts to determine the constitutionality of a statute whenever the petitioner is presently affected by its operation. *See e.g.*, Bd. of Supvrs. v. Rowe, 216 Va. 128, 216 S.E. 2d 199 (1975); Cowardin v. Burrage, 195 Va. 54, 77 S.E.2d 428 (1953); *See also* Criterion Ins. Co. v. Grange Mutual, 210 Va. 446, 449 171 S.E. 2d 669 (1976); Patterson v. Patterson, 44 Va. 113, 131 S.E. 217, 219 (1921). A declaratory action — in state or federal court — challenging the constitutionality of the law could have been maintained by either or both of the Plans had they chosen to press their arguments in an affirmative fashion.

Alternatively, one Plan or the other could have submitted a noncomplying contract to the State Corporation Commission for rejection — which is how the issue was in fact ultimately raised, although the Richmond Plan was drawn quite unwillingly into the proceedings. Commonwealth of Virginia ex rel. State Corporation Commission v. Blue Cross, et al., Case No. 19829 (PX 14-001; 002; J.A. 358,359).

sent to this case. In each case cited,[25] the boycott was motivated entirely by a desire to advance some political goal. The boycotts were wholly devoid of anticompetitive purpose. In fact, the boycotts were clearly adverse to the economic interests of the boycotting parties. In each case, the boycott represented a dramatic and highly visible means of *communicating* to the public for the purpose of obtaining political action. Further, in each case, the boycott was reasonably believed to be the only effective way to communicate political views, and, having communication as a purpose, the boycotts were short in duration.

By contrast, this case differs on all points. The Plans' boycott is directed against psychologists, a nonphysician provider group which competes in the provision of services with the Plans' own physician members. The objective of the boycott is not to exert influence on, or obtain access to, the courts or agencies, but rather to curtail "encroachment" of psychologists. There is no nexus between the Plans' refusal to reimburse nonphysician providers, and any challenge to the validity of the "Freedom of Choice" statute. The Roanoke Plan never challenged the statute; and its agreement not to comply furthered no protected goal. In fact, neither Plan had to violate the law in order to contest it. Also, there was no element of communication involved, and the boycott was in place for over seven years. As the Fourth Circuit held, the Plans' refusal to reimburse "amounted

---

[25] Missouri v. National Organization of Women, Inc. 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3216 (October 6, 1980); Crown Central Petroleum Corp. v. Waldman, 486 F.Supp. 759, 766-68 (M.D. Pa.), *rev'd. on other grounds*, 1980-2 Trade Cases ¶63,635 (3d Cir. Nov. 17, 1980); Allied International, Inc. v. International Longshoremen's Ass'n., 492 F.Supp. 344 (D. Mass. 1980).

to no more than an agreement to persist in economically restrictive commercial activity in the face of a State law designed to open up the health care market."[26]

Other courts have recognized in similar cases that the *Noerr-Pennington* doctrine protects only "speech" within usual First Amendment meanings, and that it does not extend to the "non-speech" aspects of concerted activity. Thus, the Eighth Circuit, in an opinion citing its earlier decision in *Missouri* v. *National Organization of Women, supra*, held that conduct otherwise illegal cannot be immunized merely because it is carried out by means of speech. *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255, 1267 n.14 (8th Cir. 1980). There, an ad campaign by an airline company which was part and parcel of an effort to stifle competition from a chartered flight firm was found to be an unreasonable restraint of trade. And in *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471 (N.D. Ga. 1979), an association of truckers was held to have violated the Sherman Act when its members fixed prices, submitted the fixed prices to state regulatory bodies for approval, and then implemented those prices. The court held that Congress, under the Sherman Act, can legitimately reach the "independently cognizable acts" of price fixing even though they were taken in connection with a petition to influence state actions. *Id.* at 485; *cf. Teamsters Local 695* v. *Vogt*, 354 U.S. 284 (1957) (state may prohibit picketing directed at achieving a union shop in violation of state law). As in the *Southern Motor Carriers* rate case, the concerted actions of the Blue Shield Plans to refuse to deal directly with clinical psychologists are not

---

[26] 624 F.2d at 482.

an exercise of free speech, symbolic or otherwise, but rather "constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine." 467 F.Supp. at 485.[27]

In sum, the Fourth Circuit reached the inescapable conclusion that the agreement of the Richmond and Roanoke Plans to boycott clinical psychologists was mere commercial activity, not entitled to the protection reserved for activities aimed at the passage, enforcement or rejection of state law. The Petition does not present a genuine issue worthy of review.

---

[27] The sham exception to the Noerr-Pennington doctrine was not relied upon by the Fourth Circuit in this case because the protection of the doctrine never arose with respect to the Plans' purely commercial (and otherwise illegal) activity.

Conclusion

The Fourth Circuit opinion is clearly correct in its analysis and result, and does not raise questions for which Supreme Court review is necessary or appropriate. The Fourth Circuit opinion represents an unexceptional application of familiar, well-established and long acknowledged antitrust principles. The Blue Shield Plans cannot claim surprise, for in all respects, the Fourth Circuit opinion simply concurs with earlier decisions by this Court, other federal courts and the Virginia Supreme Court. Accordingly, the Petition must be dismissed.

Respectfully submitted,

TIMOTHY J. BLOOMFIELD
Counsel of Record

ALAN KRIEGEL
DUNNELLS, DUVALL, BENNETT & PORTER
1220 Nineteenth Street, N.W.
Washington D.C. 20036
(202) 861-1440

WARWICK R. FURR, II
THOMAS M. BROWNELL
LEWIS, MITCHELL & MOORE
8320 Old Courthouse Road
Vienna, Virginia 22180
(703) 790-9200

Attorneys for Respondents, Virginia Academy of Clinical Psychologists and Robert J. Resnick

APPENDIX

APPENDIX A

(This Letter Was Introduced Into Evidence At Trial And Appears At Page 321 Of The Appendix Filed In The Fourth Circuit)

INTER-OFFICE COMMUNICATION

BLUE CROSS
BLUE SHIELD
of Virginia

To: Mr. Langhorne H. Smith

Date: March 23, 1976

From: Richard V. Morrow

Subject: PSYCHOLOGISTS' SERVICES PERFORMED BY PH.D. PSYCHOLOGISTS

In answer to your memorandum of March 22, 1976, the following are guidelines which have been utilized in the Major Medical Claims area in the adjudication of psychologists' services performed by Ph.D. psychologists.

The Major Medical Contract provided benefits for the covered services of independently-billing Ph.D. psychologists from the inception of the Major Medical Contract in 1962 until a Corporate Claims Policy reversal on February 22, 1972. This policy (Interim 21.7 issued February 22, 1972) required that for covered services performed by these providers, supervision and billing through by a physician (M.D.) must occur in order for coverage to be provided.

The above referenced Corporate Claims Policy (Interim 21.7), as previously stated, was implemented on February 22, 1972 and became a permanent policy on May 27, 1975.

From the time we began paying for these services in 1962, we were not aware that the psychologists had to be licensed until some time in 1971. Therefore, from 1962 until 1971 the services of an independently-billing psychologist, whether or not licensed, were covered; and from 1971 until February 22, 1972 we required licensing of the psychologist before services could be provided.

The contracts, to my knowledge, had no significant changes or differences during this entire period of time.